

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODERICK DION RICHARDS,

Defendant-Appellant.

UNPUBLISHED

March 9, 1999

No. 205105

Ingham Circuit Court

LC No. 97-071737 FH

Before: Jansen, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a jury trial, for delivery of more than 50 but less than 225 grams of cocaine, MCL 333.7401(1), (2)(a)(iii); MSA 14.15(7401)(1), (2)(a)(iii). He was sentenced to the mandatory sentence of ten to twenty years' imprisonment. We affirm.

Defendant first contends that insufficient evidence was presented by the prosecution to establish his guilt beyond a reasonable doubt. This Court reviews an issue regarding the sufficiency of the evidence by considering the evidence presented at trial in a light most favorable to the prosecution and determining if a rational jury could find that the essential elements of the offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 478 (1992), amended 441 Mich 1201 (1992).

Considered in a light most favorable to the prosecution, the evidence established that a Lansing police officer used an informant to set up a drug transaction with defendant and that the sale was to involve two ounces of cocaine for \$4,000. The informant arranged the sale to take place at a McDonald's restaurant. Defendant then drove to a house with the informant and another person, Jody Jones. Defendant went inside the house, returned a few minutes later, and handed a packet to Jones to give to the informant. The three returned to the McDonald's restaurant where two undercover police officers gave money to the informant. The informant returned to defendant's car and the police subsequently arrested defendant. The substance obtained by the informant was later analyzed and determined to be cocaine in an amount of 55.14 grams. This evidence was sufficient to support defendant's conviction.

Defendant next contends that the prosecution improperly presented evidence in rebuttal that should have been presented, if at all, in its case in chief. Defendant did not object to the presentation of this testimony and therefore review on appeal is foreclosed absent a showing of plain error that was decisive of the outcome of the case. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Because the testimony in question directly contradicted testimony presented by defendant, and because it was “directly responsive to material presented by the defense,” it was properly presented in rebuttal. *People v Figgures*, 451 Mich 390, 395-401; 547 NW2d 673 (1996). Defendant has therefore failed to demonstrate plain error that was decisive of the outcome of this case. *Id.* at 402-406.

Defendant next contends that evidence of prior uncharged misconduct was improperly admitted, thereby denying him a fair trial. Defendant did not object to this evidence and therefore review is forfeited absent a showing of plain error that was decisive of the outcome. *Grant, supra* at 546. The disputed evidence was a confidential informant’s testimony that he had conducted “at least a dozen” prior drug deals with defendant over the three to four years they had known each other. This testimony helped to explain how the informant could set up a two-ounce cocaine sale with defendant, how the informant could have owed defendant \$2,000, and how the informant could have recognized a digital scale recovered by the police as having belonged to defendant. This evidence was properly presented because “evidence of other criminal acts is admissible when so blended or connected with the charged crime that proof of the other criminal act explains the circumstances of the charged crime.” *People v Warren*, 228 Mich App 336, 342; 578 NW2d 692 (1998), citing *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). Defendant has therefore failed to demonstrate plain error that was decisive of the outcome of the case.

Defendant next contends that the trial court committed error requiring reversal when it rejected defendant’s claim that the prosecutor had violated *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), by using peremptory challenges to dismiss an African-American and a Hispanic prospective juror. Defendant’s objection was not made until the second day of the trial, long after the jury had been selected and sworn and had begun to hear testimony. Accordingly, the objection was not timely and this issue is not preserved for appellate review. *People v Ricky Vaughn*, 200 Mich App 32, 40, 504 NW2d 2 (1993).

Moreover, defendant has failed to present a prima facie case of purposeful discrimination. The Hispanic juror was not of defendant’s race and although the African-American juror was of defendant’s race, defendant failed to establish any circumstances that suggested that the juror was removed on the basis of race. Moreover, the prosecutor offered a proper, race-neutral explanation for excusing the African-American juror based on information in the jury questionnaire (the juror had stated in the questionnaire that he was “slow”). *People v Barker*, 179 Mich App 702, 705; 446 NW2d 549 (1989), *aff’d* 437 Mich 161; 468 NW2d 492 (1991). The prosecutor’s explanation was accepted by the trial court and we find no abuse of the court’s discretion. *People v Howard*, 226 Mich App 528, 534-536; 575 NW2d 16 (1997).

Defendant next contends that remarks made by the prosecutor in his rebuttal argument constituted misconduct requiring a new trial. The prosecutor informed the jury in passing that defendant had requested a lesser included offense instruction. Questions of prosecutorial misconduct are reviewed

on a case by case basis, evaluating each question within the particular facts of the case, to determine whether the defendant was denied a fair and impartial trial. *Id.* at 544. The remark consisted of one brief observation by the prosecutor during the rebuttal argument—less than one line of text out of almost twenty pages of transcribed argument. Further, the trial court instructed the jury that the remarks of counsel were not evidence. The trial court further instructed the jury that they must decide defendant's guilt based only on the evidence. These admonitions were sufficient to dispel any prejudice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

Lastly, defendant contends that the trial court should have departed from the mandatory minimum sentence for reasons that defendant submits are substantial and compelling. A mandatory minimum sentence reflects a legislative determination that the sentence is proportionate. *People v Ealy*, 222 Mich App 508, 512; 564 NW2d 168 (1997). A trial court's decision concerning whether particular factors constitute substantial and compelling reasons to depart from a mandatory minimum sentence is reviewed for an abuse of discretion. *People v Fields*, 448 Mich 58, 78; 528 NW2d 176 (1995). These factors must be objective and verifiable. *Id.* at 68. Defendant argues that the following factors constitute substantial and compelling reasons to depart from the mandatory minimum sentence: (1) his age, (2) his educational background, (3) his relative lack of a serious criminal record, (4) his employment history, (5) his payment of child support for two of his children, (6) his family support, and (7) his remorse for his actions. We reject the last two factors because they are neither objective nor verifiable. There is nothing remarkable about defendant's age, educational background, or his rather spotty employment record. Although defendant had no prior felony convictions, he had five prior misdemeanor convictions. Defendant presented no substantiation for his claim that he is paying child support for two of his three children. Having considered all the above factors, this Court concludes that defendant failed to present an exceptional case. He has therefore failed to demonstrate an abuse of the trial court's sentencing discretion.

Affirmed.

/s/ Kathleen Jansen

/s/ David H. Sawyer

/s/ Stephen J. Markman